Federal Court  Cour fédérale

Date: 20130130

Docket: IMM-8800-11

Citation: 2013 FC 95

Ottawa, Ontario, January 30, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

FERENC HORVATH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (the Board), dated November 4, 2011, wherein the applicant was determined to be neither a Convention refugee within the meaning of section 96 of the Act nor a person in need of protection as defined in subsection 97(1) of the Act.

[2] The applicant requests that the Board's decision be set aside and the application be referred back to the Board for redetermination by a different panel.

Background

[3] The applicant is a citizen of Hungary of Roma ethnicity. He alleges that since childhood, he has experienced verbal and physical assaults in Hungary due to his ethnicity. As an adult, he was denied work for the same reason.

[4] The applicant was assaulted in 1991, 2005, 2007 and 2009. Each of these attacks was a result of his fellow citizens targeting him due to his ethnicity. After the 2007 attack, the applicant sought the help of the police who responded by using a racial slur and physically removing the applicant from the police station. The applicant's doctor believes he now requires mental health treatment as a result of these attacks. Multiple members of the applicant's extended family were also attacked due to being Roma.

[5] After the 2007 attack, the applicant and his wife moved to Budapest with the hope that it would be safer. However, in March 2010, the applicant's wife was assaulted and suffered a neck injury. As a result of this incident, the applicant decided to leave Hungary.

[6] The applicant arrived in Canada on March 13, 2010 and applied for refugee protection on the same day. His claim was heard on August 9, 2011.

Board's Decision

[7] The Board began by summarizing the applicant's allegations and accepted his identity and citizenship.

[8] On the issue of credibility, the Board drew adverse inferences against the applicant due to the omission from his Personal Information Form (PIF) narrative and initial oral testimony of police attacks in 1991 and 2005. The details of the use of tear gas and an extendable baton during a 2007 attack were similarly omitted. The Board rejected the applicant's explanation of following instructions of keeping his narrative short, due to the importance of these events to his claim.

[9] The Board also noted that the Hungarian medical report did not confirm the use of the tear gas. The Board made a negative credibility determination.

[10] The Board rejected the applicant's submission that discrimination against Roma in Hungary rises to the level of persecution, while noting that racial discrimination does marginalize Roma people.

[11] The Board identified state protection as the determinative issue in this claim. The Board found that there was a presumption that Hungary was capable of protecting the applicant given its status as a functioning democracy. The Board found that the applicant had not made a concerted effort to seek protection, as he had not reported the 1991, 2005, 2009 or 2010 incidents to the police

and did not further pursue his complaint regarding the 2007 incident after help was denied at a police substation.

[12] The Board reviewed country conditions evidence and found that Hungary has made significant improvements in its protection of Roma citizens and that the state for the most part does not acquiesce to the discriminatory behaviour of the police, the public or radical groups.

[13] Given the availability of venues to seek protection against discrimination, the Board found the applicant cannot claim he has received no state protection over the eighteen year period. His lack of concerted effort to seek protection was fatal to his claim. The applicant did not rebut the presumption of protection. Therefore, the Board rejected his claim.

Issues

[14] The applicant submits the following points at issue:

1. Did the Board err in its credibility assessment?
2. Did the Board err in failing to assess whether discrimination amounted to persecution?
3. Did the Board err in finding that state protection was available?

[15] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board err in rejecting the applicant's claim?

Applicant's Written Submissions

[16] The applicant argues that the 1991 and 2005 incidents were omitted from his PIF because he thought he would be asked for more details later and was told online to outline events since 2007. As for his initial oral testimony, it is reasonable to only expect the applicant to answer those questions asked by the Board.

[17] The details of the tear gas and the baton were omitted because the applicant was told to keep his narrative short. The applicant was unrepresented when completing his PIF, has a grade eight education, little English fluency and therefore cannot be expected to understand instructions perfectly.

[18] The Board's assumption that tear gas would require treatment by a doctor is unfounded given its lack of medical expertise. The Board ignored corroborating evidence of the applicant's family members.

[19] The Board was obliged to consider the applicant's credibility with the applicant's psychological assessment in mind. The reasons show no evidence that the Board ever acknowledged the applicant was suffering from mental health issues.

[20] The Board did not appear to understand the concept that cumulative discrimination can amount to persecution, regardless of a state's efforts to alleviate such discrimination. The issue of

whether discrimination amounts to persecution is distinct from whether the applicant's claim has a nexus to the Convention. The applicant clearly has the nexus of ethnicity.

[21] On state protection, the Board believes that a European country cannot give rise to refugees because a certain level of democracy exists. Democracy should be assessed on a spectrum and state protection must be assessed contextually.

[22] The most any agency in Hungary can do with a complaint against police is to make a recommendation. This is not a method of protection. Police reports are not required where they would be futile.

[23] The Board has referred to the attacks against the applicant as common crimes, when they are in fact hate crimes. The applicant's country conditions evidence showed that the police failed to label hate crimes as such.

[24] The Board ignored the most crucial piece of country conditions evidence, a summary by the United Nations Special Rapporteur to Hungary concluding that anti-Roma discrimination and violence in Hungary has worsened, not improved. While the Board is not required to mention all evidence, its reasoning must reflect the fact that the evidence was actually considered.

[25] State protection implies prevention, not just recourse after attacks. Violence against Roma is increasing, which means protection is inadequate.

Respondent's Written Submissions

[26] The respondent argues it is reasonable for the Board to consider omissions from a claimant's PIF as undermining credibility. The Board is in the best position to weigh evidence. The Board considered the applicant's explanation for the omissions and rejected it.

[27] The respondent submits a reasonable finding of state protection is a sufficient basis upon which to dispose of an application for judicial review. The Board canvassed the documentary evidence and reasonably concluded that the state would be forthcoming in protecting the applicant. It was reasonable for the Board to conclude the applicant's lack of action to seek assistance is fatal to his claim.

[28] There is no evidence the Board ignored the UN report. The Board acknowledged that some problems continue for the Roma in Hungary. The applicant is asking the Court to reweigh the evidence.

Analysis and Decision

[29] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[30] It is established jurisprudence that credibility findings, described as the "heartland of the Board's jurisdiction", are essentially pure findings of fact that are reviewable on a reasonableness standard (see *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraph 7, [2003] FCJ No 162; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 SCR 339; and *Demirtas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 584 at paragraph 23, [2011] FCJ No 786 at paragraph 23).

[31] Similarly, issues of state protection and of the weighing, interpretation and assessment of evidence are reviewable on a reasonableness standard (see *Giovani Ipina Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733 at paragraph 5, [2011] FCJ No 924 and *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045 at paragraph 38, [2009] FCJ No 1286).

[32] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47, and *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[33] **Issue 2**

Did the Board err in rejecting the applicant's claim?

The applicant argues that the Board was not aware that discrimination could rise to the level of persecution within the meaning of section 96 of the Act. While the Board's consideration of this point may have been cursory, the decision clearly contemplates the applicant's argument on this point, as indicated by its finding that "this behaviour [discrimination in Hungary] does not reach the level of persecution" and its conclusion that "the claimant in the case at bar has not suffered discrimination that rose to the level of persecution".

[34] I do not agree with the applicant that the decision confuses the issues of nexus and persecution, despite their analysis under a shared heading. Instead, my concern is that the Board provided no reasons for its finding of a lack of nexus other than the bald statement that the Board "does not agree with these submissions". The subsequent paragraphs discuss persecution and there is no further discussion of nexus elsewhere in the decision. This opacity, combined with the fact that the applicant obviously and repeatedly alleged that the violence he suffered was due to his Roma ethnicity, renders this finding unreasonable.

[35] On the issue of credibility, the Board was concerned about the inconsistencies in the applicant's PIF narrative and testimony relating to the dates and other details of various acts of violence against him. This is a valid concern. Such a concern, however, should have been analyzed in light of the medical evidence adduced by the applicant relating to his mental state in the form of a letter from his clinical psychologist:

> Mr. Horvath has become distracted and forgetful (e.g., he confuses dates and details of past events; he forgets names, telephone

> numbers, and addresses; he often misplaces his keys). Concentration and memory problems are common among people exposed to traumatic stress and are associated with mental illness. Difficulties are exacerbated under pressure, such as arises in the high-stakes context of a Refugee Hearing. Symptoms can take the form of difficulty understanding questions, requests for questions to be repeated or rephrased, inability to retrieve specific details of the past, or an apparent inability to formulate a coherent response.

[36] The Board is presumed to have considered all of the evidence before it and need not mention every piece of evidence (see *Oprysk v Canada (Minister of Citizenship and Immigration)*, 2008 FC 326 at paragraph 33, [2008] FCJ No 411). However, the more important the evidence that is not mentioned, the more willing a court may be to infer from silence that a tribunal made a finding of fact without regard to the evidence (see *Pinto Ponce v Canada (Minister of Citizenship and Immigration)*, 2012 FC 181 at paragraph 35, [2012] FCJ No 189).

[37] The Board made no mention of this letter or the applicant's mental health issues. Given the important and obvious relevance of such evidence to the applicant's credibility and his ability to provide a consistent and detailed narrative of his persecution from memory, this omission rises to the level described in *Pinto Ponce* above. The credibility finding is therefore unreasonable and outside the range of acceptable outcomes.

[38] However, even if the applicant had established nexus and was found by the Board to be credible in regard to his allegations of past persecution based on a Convention ground, a finding of state protection alone is sufficient for a refugee claim to fail (see *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraph 39, [2009] FCJ No 1591). Therefore, I turn to state protection, which the Board identified as determinative.

[39] It is well established that an applicant bears the burden of demonstrating, on a balance of probabilities and based on relevant, reliable and convincing evidence, that his or her home country provides inadequate state protection (see *Giovani Ipina Ipina* above, at paragraph 5).

[40] I do not agree with the applicant's argument that the Board operated on the blanket assumption that a European country cannot give rise to refugees, nor did it infer that the existence of free elections dictated the availability of state protection. In making its determination, the Board conceded that discrimination does exist against Roma in Hungary and identified a number of institutions relevant to protection.

[41] The applicant argues the Board failed to mention one country conditions document, the report of the UN Rapporteur, which indicated that conditions for Roma have worsened.

[42] Specifically, the applicant further argues that the state institutions identified by the Board are not those which can provide him protection against the threat of racist violence by private citizens. Indeed, many of the institutions cited by the Board, such as the Equal Treatment Authority, the Department of Roma Integration and the Roma Anti-Discrimination Customer Service Network, appear designed to combat anti-Roma discrimination as opposed to anti-Roma violence.

[43] The applicant did include discrimination as part of the grounds for his claim, so it was entirely appropriate for the Board to consider anti-discrimination institutions. The issue, though, is whether the Board additionally adequately dealt with the applicant's contention that the Hungarian state could not protect him from outright violence.

[44] On this point, the applicant emphasizes that the UN Rapporteur's report indicated that racial violence has worsened, as well as an Amnesty International report indicating that Hungarian police response fail to properly label hate crimes as such, instead referring to them as common crimes. The Board did acknowledge that extremist violence has increased, noting "as claimant's counsel has noted in her written submissions, some problems have worsened, such as extremist violence and public rhetoric against ethnic and religious minorities".

[45] This raises the *Dunsmuir* above value of justification; that is, whether the Board has reasonably justified its finding of state protection given its acknowledgement of submissions indicating violence was increasing.

[46] The Board found that "the documentary evidence indicates that Hungary is making best efforts to offer state protection when requested and it has made significant improvements". It is true that some of the documents considered by the Board indicated efforts had been made by the Hungarian government; however, positive efforts do not always bring positive outcomes. The distinct finding that Hungary had made significant improvements was not adequately justified in light of the country conditions evidence described above.

[47] It is not clear from the Board's reasons or the record why the UN Rapporteur's findings that violence had gotten worse was rejected in favour of a determination that conditions had improved. The fact that the Board referred to the increase in violence as a submission of the applicant's counsel, instead of originating in the Rapporteur's report, compounds this lack of transparency, as it is not clear whether the underlying document was properly considered.

[48] These omissions render the Board's decision on state protection unreasonable.

[49] As a result of my findings, the application for judicial review must be allowed and the matter is referred to a different panel of the Board for redetermination.

[50] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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